LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 1 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1970

[redacted] 210

CHARLES DAVIDA,

Petitioner.

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROGER M. DOUGHERTY, ESQUIRE
JAMES M. O'NEILL, ESQUIRE
Counsel for Petitioner
1101 - 17th Street, N. W.
Washington, D. C.

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

	Page
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT	5
1. Proceedings below	5
2. Summary of case and evidence below	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15
APPENDIX	1

Cases Cited:

Carroll v. United States, 267 US 132	13
Chapman v. United States, 81 S. Ct. 822	11
Cooper v. California, 386 US 58	12

	Page
Harris v. United States, 299 F.2d 931	8
Lash v. United States, 221 F.2d, 237	8
Lockett v. United States, 389 F.2d, 168	13
Navarro v. United States, 400 F.2d, 315	6, 10
Rent v. United States, 209 F.2d, 893	14
Sirimarco v. United States, 315 F.2d, 699	10, 12
Stevens v. United States, 256 F.2d, 619	8

Statutes Cited:

Title 49, United States Code, §783	3
Article 14.04, Vernon's Texas Statute Annotated	4
Article 14.05, Vernon's Texas Statute Annotated	4
Rule 41(a) Federal Rules of Criminal Procedure	2, 4

Constitution Cited:

4th Amendment	3
5th Amendment	3

IN THE

Supreme Court of the United States

October Term, 1969

NO. .

CHARLES DAVIDA,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Charles Davida, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the United States District Court for the Northern District of Oklahoma.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 10, 1970. A petition for rehearing was denied on April 20, 1970. Petitioner requests waiver of the time limitation of Rule 22 (2) for the filing of this petition for good cause as follows: The Clerk of the Court of Appeals for the Tenth Circuit erred in advising Petitioner's counsel (newly retained May 5, 1970), that the entry date of the final judgment was May 1, 1970; which date was, instead, the date of the entry of the order to stay the mandate. This petition is filed within 30 days of the date given by the Clerk to counsel. Counsel learned of the correct date of entry of the final judgment upon request and receipt of the certified certiorari record of the case from the Court of Appeals. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

(1) Whether petitioner's conviction in the trial court can be affirmed by the U.S. Court of Appeals on the basis of a new and different legal theory involving the admission of evidence against petitioner in the trial court, which theory was never argued in or considered by the trial court and was introduced by the Government for the first time in its appellate brief.

(2) Whether local police officers making a search of petitioner's automobile as a result of agreement with and on behalf of Federal Officers, made such search pursuant to the provisions and requirements of Rule 41(a) of the Federal Rules of Criminal Procedure; whether a search warrant issued by a court of record was required, and whether the words "court of record" apply to state and other courts enumerated in Rule 41(a) or only to "territorial courts."

(3) Whether petitioner's automobile which was impounded by local police officers under authority of a local city ordinance may be considered as having been seized by said officers pursuant to 49 USC 783, the "Federal Contraband Seizure Act", and whether such statute empowers local police officers not authorized or designated by the Secretary of the Treasury to seize and search petitioner's automobile for evidence to be used against the petitioner in his trial in a Federal Court for a federal offense.

(4) Whether local police officers in arresting petitioner for a federal offense and impounding petitioner's automobile pursuant to a local city ordinance, may search said automobile for evidence without a valid search warrant some fourteen hours after impounding of the automobile while it is in their custody, locked and at rest, with no likelihood of its being disturbed.

CONSTITUTIONAL PROVISIONS INVOLVED

4th Amendment, Constitution of the United States provides, in pertinent part: "The right of the people to be secure in their person, . . . papers, and effects, against unreasonable search and seizures, . . . and no warrant shall issue, but upon probable cause. . . ."

5th Amendment, Constitution of the United States provides, in pertinent part: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."

STATUTORY PROVISIONS INVOLVED

Title 49 of the United States Code, Section 783 provides in pertinent part:

"The Secretary of the Treasury is empowered to authorize or designate, officers, agents, or other persons to carry out the provisions of this chapter. It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any . . . vehicle which has been or is being used in violation of any of the provisions of this chapter [49 USC 781, *et al*]; or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such . . . vehicle . . . and to place it in custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury, to await disposition pursuant to the provisions of this chapter and any regulations issued thereunder."

Article 14.04 of Vernon's Texas Statute Annotated, provides:

"Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such officer may without warrant, pursue and arrest the accused."

Article 14.05 of Vernon's Texas Statute Annotated says:

"In each case enumerated where arrests may be lawfully made without warrant, the officer . . . making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant.

Rule 41(a), Federal Rules of Criminal Procedure:

"(a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record, or by a United States commissioner within the district wherein the property sought is located."

STATEMENT

1. Proceedings below.

The Petitioner, Charles Davida, was convicted under indictment charging him with violating Title 18, USC § 472, alleging that on December 14, 1967, in the Northern District of Oklahoma, he did, with intent to defraud, pass and utter at the Shearer D-X Service Station, in Tulsa, Oklahoma, a falsely made and counterfeited obligation and security of the United States, being a Five Dollar ($5.00) Federal Reserve Note, Series 1963A, Check Letter G, Face Plate No. 10, Back Plate No. 19, Serial No. F 24777827A, purportedly issued on the Federal Reserve Bank of Atlanta, Georgia, with the intent that the same be passed, uttered and used as a true and genuine note, knowing said note to be counterfeit.

Trial was had before a jury on March 10 and 11, 1969, upon Petitioner's plea of not guilty. The jury found Petitioner guilty and the court on April 8, 1969, sentenced him to five years in the penitentiary.

Thereafter bond on appeal and notice of appeal were filed with the clerk of court. On February 10, 1970, The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court and Petitioner's Motion for Rehearing was denied by that court on April 20, 1970.

On May 1, 1970, the Court of Appeals issued an order staying its mandate in accordance with the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

2. Summary of case and evidence below.

Evidence was presented at the trial that the Petitioner had passed a counterfeit $5.00 note in Webb City, Missouri, prior to the Oklahoma offense. Further evi-

dence was presented that after the Oklahoma offense, Petitioner passed a counterfeit $5.00 note at a service station in Amarillo, Texas. However, very shortly after the $5.00 counterfeit note was passed in Amarillo, the service station attendant receiving the note discovered it was counterfeit and notified the Amarillo City Police, giving them a description of the Petitioner and the Cadillac car he was driving. Shortly thereafter Amarillo police saw the car at a restaurant and observed the Petitioner enter the same and drive away. They then stopped the Petitioner in the car, took him to the City Jail and took his Cadillac car to a garage where the same was impounded. There were no United States Secret Service Agents situated in Amarillo but agents located in Dallas had jurisdiction over the Amarillo area. The Amarillo police called the Secret Service in Dallas and reported the incident. After this call, and some 14 or 15 hours after Petitioner was arrested and the Cadillac impounded, the Amarillo police obtained a search warrant from a Texas Justice of the Peace and searched the Petitioner's Cadillac car. Thirty counterfeit $5.00 notes were found under the floor mat of the car. These were turned over by the Amarillo police to the Secret Service agents later that same day. The evidence resulting from this search was admitted by the trial court over the objection of the Petitioner.

The Petitioner based his appeal on the primary point of error that said search and seizure was illegal, and the introduction of evidence so discovered, inasmuch as Rule 41(a), Federal Rules of Criminal Procedure, requires that a search warrant issued by a judge of a state court, in order to be valid, must be issued by a state court of record. In support of this argument, Petitioner cited *Navarro v. U.S.* 400 F.2d 315. The parties and the appellate court agreed that a Texas Justice of the Peace is not a court of record.

The Court of Appeals, in affirming the trial court's judgment, held that a "vehicle which has been lawfully seized because of use in transporting contraband may be seized without a search warrant or the consent of the possessor owner, and evidence so discovered may be properly admitted in a contraband prosecution" pursuant to the Contraband Seizure Act, 49 USC, 781, *et. seq.*

The Petitioner sought a rehearing by the Court of Appeals on the basis that the Court, in its affirming opinion, did not rule on the primary point of error alleged by the Petitioner, but, in effect, held that the validity of the search warrant became a moot question and adopted the Government's new argument or theory that the search and evidence seized therefrom did not require a search warrant and the use, even if determined contrary to Rule 41(a) of the Federal Rules of Criminal Procedure, did not serve to make the search invalid and the evidence inadmissable in Court. The Government's argument was in reliance upon the "contraband statute", 49 USC 783, which Petitioner contends was not the basis for the arrest, search and seizure; and this being a legal question not raised nor considered in the trial court, it deprived the Petitioner of a fair trial, an opportunity of developing all pertinent facts and of making proper and timely objections. Petitioner contends that the appellate court is limited to reviewing alleged errors in law and that the action of the Court in basing its opinion on a legal question not raised nor considered in the trial court is beyond its scope of review.

REASONS FOR GRANTING THIS WRIT

(1) The initial and novel question presented by this petition is of great importance to the proper administration of criminal justice, in that it affects the fairness, integrity and public reputation of judicial proceedings

The most damaging evidence in the case obtained through a legally questionable search, was allowed to be introduced in evidence over the objection of the petitioner. The Government argued that such evidence was admissable under its theory of the applicable law and the trial court admitted the evidence on the basis of the Government's argument and cited cases. The Court of Appeals affirmed petitioner's conviction and held that the damaging evidence was properly admitted on the basis of an entirely different statute and legal theory which the Government presented for the first time in its brief filed in the Court of Appeals.

Petitioner believes that this case presents a novel question because he has been unable to find any case where the sole ground for affirmance was raised for the first time by the Government in the Court of Appeals or where this question was even considered.

A search of the cases in which "plain" error was noticed by the Courts of Appeals under Rule 52(b) of the Federal Rules of Criminal Procedure indicates that all of such cases were ones in which the courts were considering and based their decision on serious prejudice to the Defendants and errors affecting their substantial rights. There is no suggestion in such cases that prejudice to the Government is sufficient to warrant notice by the appellate court of errors committed during the trial.

Absent a clear showing of prejudice to the Defendants, the Courts of Appeals are not disposed to notice alleged errors which are raised for the first time on appeal. *Harris v. United States,* 112 App. D.C. 100, 299 F.2d. 931; *Stevens v. United States* (CA 9 Idaho) 256 F.2d, 619; *Lash v. United States* (CA 1 Mass.) 221, F.2d, 237, cert. den. 350 US 826, 100 L.Ed. 738, 76 S. Ct. 55.

To allow the Court of Appeals to base its affirmance of a conviction on a legal theory not presented by the Government in the tiral court can only result in serious prejudice to the Defendant. In the instant case, had the Government argued in the trial Court that no search warrant was necessary and that the local police officers were authorized or designated by the Secretary of the Treasury to seize the automobile (and thereafter search without a warrant), the Petitioner would have been on notice and would have had the opportunity to develop the factual evidence as to the authority of the local police officers to make the search. Not having been afforded the right to develop all of the facts and to argue in the Trial Court the Government's new theory of law for the admission of the damaging evidence, was a violation of due process of law and deprived the Petitioner of a fair and full hearing in the Trial Court and of a proper and orderly appeal in the Court of Appeals.

(2) The second question raised in this petition goes to the primary basis of the Peitioner's appeal; namely, that the search warrant issued by a Justice of the Peace of Amarillo, Texas, resulting in the recovery from Petitioner's automobile of certain counterfeit bills was illegal.

The Appellate court did not pass on this point, but held that the question of the validity of the search warrant was moot and that the search and evidence obtained therefrom did not require a search warrant. Relying on the Government's newly advanced argument under 49 USC 783, the appellate court found that use of such a warrant, even if determined contrary to Rule 41(a) of the Federal Rules of Criminal Procedure did not serve to make the search invalid nor evidence seized therefrom inadmissable.

Petitioner maintains that the alternative theories of the trial court remain at issue: That it was a state initiated

search with a state search warrant, but if not it was a federal search applying the law of *Navarro v. United States* (400 F.2d 315) and Rule 41(a) of the Federal Rules of Criminal Procedure.

Nowhere in the record does the Government contend that the search was made pursuant to a state statute nor incident to, the arrest. On the Contrary, the record is clear that Petitioner's automobile was impounded pursuant to the City of Amarillo Traffic Regulations (pertinent provisions of which are attached to Petitioner's Petition for Rehearing and included in the certified record from the appellate court) which provide for the use of a local garage for the storage of all vehicles owned by any person arrested and placed in confinement.

The record is clear that the Amarillo police contacted the Secret Service Office in Dallas and advised said office of Petitoner's arrest and confinement and their custody of Petitioner's automobile. Whereupon the Amarillo police with agreement from and on behalf of the Federal Officers, procured a search warrant, conducted the search and discovered the counterfeit bills.

The government relies entirely on the case of *Sirimarco v. U.S.*, 315 Fed F.2d 699, 10th Circuit 1963. The four year conviction was affirmed with Chief Judge Murrah and Circuit Judge Hill dissenting. In the Sirimarco case, *supra*, it may be noted that the Treasury Agent from Denver came to Trinidad, Colorado, after the automobile was taken from Raton, New Mexico to Colorado by state officers. That the Defendant was placed in jail and the automobile remained under the control of the state officers. The question of seizure and subsequent search by the Treasury Agent was never answered.

The search was made without warrant exclusively by the Treasury Agent after being satisfied that the Twenty

Dollar Note was counterfeit and therefore contraband. Chief Judge Murrah in his dissenting opinion strongly contends that a search warrant should have been obtained, there being no possibility of the vehicle being taken from the control of the officers, being the identical situation in this case. The automobile was stored under the Amarillo City ordinance; the Petitioner was in jail without any charges being filed against him. Also see *Chapman v. U.S.*, 81 S. Ct. 822.

Petitioner therefore maintains that a valid search warrant should have been obtained and in view of the circumstances could easily have been obtained pursuant to the provisions of Rule 41(a) FRCP. Rule 41(a) states:

> "(a) Authority to Issue Warrant. A search warrant issued authorized by this rule may be issued by a judge of the United States or of a state, commonwealth, or territorial court of record, or by a U.S. Commissioner within the district wherein the property sought is located."

Petitioner further contends that the modifying words, "court of record" as used in Rule 41(a) apply to state and commonwealth courts as well as to territorial courts. Since such a warrant was not obtained in this case and since the search was in fact a "federal search" being conducted by local officers on behalf of Federal officers, the search was unlawful and evidence obtained therefrom was inadmissable in evidence against the Petitioner.

(3) In dealing with this question and apparently holding that the local police officers were authorized and designated by the Secretary of the Treasury to make seizures under the Federal Contraband Statute and that a seizure had been made under that statute although the petitioner's automobile was impounded by them under authority of a local ordinance, the Court of Appeals

says: "Several courts, including our Circuit, have held that a vehicle which has been lawfully seized because of transporting contraband may be searched without a search warrant or the consent of the possessor, and that the evidence so discovered may be properly admitted in a contraband prosecution. This is pursuant to the Contraband Seizure Act, 49 USC 781, *et seq.*"

The court then goes on to cite a series of cases beginning with *Sirimarco v. United States*, 315 F.2d 699 (Tenth Circuit, 1963). These cases are not in point, with the exception of *Cooper v. California*, 386 U.S. 58, 17 L.Ed. F.2d 730, 87 S. Ct. 788 (1967) none of the cited cases deal with a search by a state officer; they deal with searches by federal officers pursuant to federal statutes. The Cooper case, *supra*, deals with a search by a state officer pursuant to a state statute. No Texas statute has been cited and petitioner knows of none which provides for searches and forfeitures as in the Cooper case.

Petitioner concedes that had a federal officer arrested him and seized and searched his automobile pursuant to 49 USC 783, the evidence found would be admissable.

Petitioner concedes that the Amarillo police officers involved were authorized to make an arrest for violations of a federal felony statute if they had probable cause to believe that the same had been or was being violated; he cannot concede that a state officer can invoke 49 USC 783 to justify a seizure and search which is otherwise in violation of the 4th Amendment. The pertinent parts of this section provides:

> "It shall be the duty of any officer, agent, or other person so authorized or designated, or authorized by law, whenever he shall discover any . . . vehicle . . . which has been or is being used in violation of any provisions of this chapter, . . . to seize such . . .

vehicle . . . and to place it in the custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury to await disposition. . ."

Nowhere in that statute does it specifically say that any and all local officers are authorized to seize vehicles for reasons indicated in the statute and no other statute is cited as we know of, none which empowers local or state officers to invoke and carry out the authority which it gives. The right of a state officer to make an arrest for violation of a federal law does not carry with it the right to seize vehicles and search them under 49 USC, 783. *Carrol v. United States* 267 U.S. 132, 168, 45 S. Ct. 280, 287, 69 L.Ed. 543, 554 (1925).

If the Amarillo police officers were authorized or designated by the Secretary of the Treasury, or authorized by law, to seize petitioner's automobile, the Government had the burden of proof of such fact and had this question been raised in the Trial Court, petitioner would have had the opportunity to refute the Government's evidence of such. The Government did not present any such evidence as there was nothing in the record before the Court of Appeals to support that Court's apparent holding that the Amarillo police officers were authorized to carry out the provisions of 49 USC 783.

In dealing with petitioner's contention that the Amarillo police did not seize his Cadillac car, the Court of Appeals cites *Lockett v. United States*, 390 F.2d 168 (Ninth Cir. 1968), and quotes language from the opinion in that case which seems to say that if the officers had physical possession of the car, it had been "seized" at the same moment. However, the principal seizing officer in that case, Morbello, was a Post Office Inspector and there was no question in the case of previous impounding or taking possession of the vehicle by state officers,

Petitioner contends that *Rent v. United States*, 209 F.2d 893 is directly in point on the question of seizure and search of an automobile by local police officers after an arrest for violations of a federal law. In that case the Court stated in part:

> "Officer Griffin did not then "seize" the automobile for transporting contraband, 49 USCA 781, 782, 787(d), but he did take the car into custody with the intentions of searching it."

The Court held that the search without warrant of defendant's automobile more than ten hours after the defendant's arrest, without warrant, for violations of narcotics law, where the searching officer had ample time and opportunity to apply for a search warrant, was not justified, and the evidence obtained thereby was required to be excluded. The Court reasoned that there was no urgency in searching the automobile because it was at rest and was actually in the custody of the officers, locked, and not likely to be disturbed. Petitioner contends that the same reasoning applies to the circumstances of his case. His car was impounded by the Amarillo police and there was no danger of any evidence being disturbed. A lawful search of Petitioner's Cadillac car could have been made had the Amarillo police awaited the arrival of the Secret Service Agent whereupon a valid search warrant from a court of record could have been obtained or the Secret Service agent if he was authorized or designated by the Secretary of the Treasury to seize automobles under 49 USC 783, could have seized the automobile and search it without a warrant.

CONCLUSION

For the foregoing reasons, certiorari should be granted, the judgment of the court below should be reversed, and the case should be remanded for a new trial.

Respectfully submitted,

Roger M. Dougherty
Counsel for Petitioner
1101 17th St., N. W.
Washington, D. C. 20036
296-0780

TENTH CIRCUIT

NOVEMBER TERM 1969

CHARLES DAVIDA
Appellant
vs.
UNITED STATES OF AMERICA
Appellee
No. 304–69

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

George S. McCarthy,
Amarillo, Texas,
for Appellant

Hubert A. Marlow,
Assistant United States
Attorney for the Northern
District of Oklahoma,
for Appellee

Before HICKEY, United States Circuit Judge, HOLLOWAY, United States Circuit Judge, and EUBANKS, United States District Judge

EUBANKS, United States District Judge

Filed: February 10, 1970

Appellant, Charles Davida, was convicted in a jury trial of passing a counterfeit $5.00 federal reserve note at a service station in Tulsa, Oklahoma and was sentenced to five years imprisonment. The prosecution was under Title 18, United States Code, Section 472. This is a direct appeal from that conviction and sentence.

Evidence presented at the jury trial revealed that the Appellant had passed a counterfeit $5.00 note in Webb City, Missouri prior to the Tulsa offense. This evidence is not attacked by Appellant. After the Tulsa offense, the evidence revealed that Appellant passed a counterfeit $5.00 note at a service station in Amarillo, Texas. This evidence is not attacked by Appellant. However, very shortly after the $5.00 counterfeit note was passed in Amarillo, the service station attendant receiving the note discovered it was counterfeit and notified the Amarillo City Police, giving them a description of the Appellant and the Cadillac car he was driving. Shortly thereafter Amarillo police spotted the car at a restaurant and observed the Appellant enter the same and drive away. They then stopped the Appellant in the car, took him to the City Jail and took his Cadillac car to a garage where the same was impounded. There were no United States Secret Service Agents situated in Amarillo but agents located in Dallas had jurisdiction over the Amarillo area. The Amarillo police called the Secret Service in Dallas and reported the incident. After this call, the Amarillo police obtained a state search warrant from a Texas Justice of the Peace and searched the Appellant's Cadillac car. Thirty counterfeit $5.00 notes were found under the floor mat of the car. The result of this search was admitted in evidence by the trial court over the objection of the Appellant.

Appellant cites *Navarro v. U.S.*, 400 F.2d 315, in support of his claims that the said search and seizure was

illegal as Rule 41(a), Federal Rules of Criminal Procedure, requires that a search warrant issued by a judge of a state court, in order to be valid, must be issued by a state court of record. It is agreed that a Texas Justice of the Peace is not a court of record.

However, the Government urges that the said search and evidence seized therefrom did not require a search warrant and that the cautionary use of one, even if deemed to be contrary to Rule 41(a), Federal Rules of Criminal Procedure, did not serve to make the search invalid and the evidence seized therefrom inadmissible in court. In this connection, the Government relies on 49 U.S.C. 783, which makes it the duty of an officer *authorized by law*, whenever he shall discover a vehicle which has been or is being used in violation of the law in the transportation of a contraband article, to seize the same. Said statute reads:

> §783. *Designation of officers by Secretary of Treasury; duties of officers*
>
> The Secretary of the Treasury is empowered to authorize, or designate, officers, agents, or other persons to carry out the provisions of this chapter. It shall be the duty of any officer, agent, or other person so authorized or designated, or *authorized by law*, whenever he shall discover any vessel, vehicle, or aircraft which has been or is being used in violation of any of the provisions of this chapter, or in, upon, or by means of which any violation of this chapter has taken or is taking place, to seize such vessel, vehicle, or aircraft and to place it in the custody of such person as may be authorized or designated for that purpose by the Secretary of the Treasury, to await disposition pursuant to the provisions of this chapter and any regulations issued hereunder.

Counterfeit federal reserve notes are contraband. 49 U.S.C. 781(b)(3). The Amarillo police officers involved were authorized by law and fully empowered to enforce a federal criminal statute involving a felony when they had probable cause to believe that the same had been or was being violated. Articles 14.04 and 14.05, Veronon's Texas Statutes Annotated; *United States v. Di Re* 332 U.S. 581, 92 L.Ed. 210, 68 S. Ct. 222 (1948); *Whitlock v. Boyer*, 271 P. F.2d 848 (Ariz. 1954); *Rent v. United States*, 209 F.2d 893 (Fifth Cir. 1954); *Buick v. United States*, 396 F.2d 912 (Ninth Cir. 1968); *Marsh v. United States*, 29 F.2d 172 (Second Cir. 1928); *Dorsey v. United States*, 174 F.2d 899 (Fifth Cir. 1949). Here, the Amarillo police had probable cause to believe that the Appellant had violated federal law in passing a $5.00 counterfeit note at an Amarillo service station and was using his Cadillac car in doing so. This probable cause was obtained from the Amarillo victim of Appellant, the service station attendant, who provided a description of the Appellant and also the Cadillac car in which he drove into and out of the service station in connection with his passing the $5.00 counterfeit note. Thus, the Amarillo police had probable cause to believe that federal law had been violated with reference to the passing of a $5.00 counterfeit note in Amarillo and they were authorized to enforce said law by arresting the Appellant and seizing his Cadillac car used in the commission of the offense.

Several courts, including our Circuit, have held that a vehicle which has been lawfully seized because of use in transporting countraband may be searched without a search warrant or the consent of the possessor owner, and evidence so discovered may be properly admitted in a contraband prosecution. This is pursuant to the Contraband Seizure Act, 49 U.S.C. 781 *et seq.*. *Sirimarco v. United States*, 315 F.2d 699 (Tenth Cir. 1963); *Drummond v. United States*, 350 F.2d 983 (Eighth Cir. 1965);

United States v. Troiano, 365 F.2d 416 (Third Cir. 1966); *United States v. Ziak*, 360 F.2d 850 (Seventh Cir. 1966); *Burge v. United States*, 342 F.2d 408 (Ninth Cir. 1965); *United States v. Francolino*, 367 F.2d 1013 (Second Cir. 1966). The United States Supreme Court in *Cooper v. California*, 386 U.S. 58, 17 L.Ed 2d 730, 87 S.Ct. 788 (1967), approved a warrantless search under the seizure and forfeiture doctrine. In Cooper the car was seized by state police when the driver was arrested for narcotics violations (also contraband) in which the car was involved. The warrantless search occurred one week after the arrest and seizure and the evidence obtained thereby was held to be admissible in evidence.

The argument made by Appellant that the Amarillo police did not seize Appellant's Cadillac car is without support in fact or law. When a vehicle is taken into police custody under the circumstances of this case, it is seized within the meaning of the seizure and forfeiture statutes. *Lockett v. United States*, 390 F.2d 168 (Ninth Cir. 1968). This case held:

> "It is plain from the record that when Morbello and the other officers searched the car they had physical possession of it. Without that possession search would have been impossible. Thus, it cannot be questioned but that at the moment the vehicle had been 'seized' within the meaning of Title 49 § 782. That it was rightfully seized is crystal clear for Morbello and the others knew absolutely that it had been used to transport contraband . . ." p. 172

Our Circuit has held that a search not made under subjective claim or knowledge of the right to make the same but in fact lawfully made remains lawful and the evidence obtained is admissible. *Sirimarco v. United States, supra.* This case provides:

"A lawful search, though not made under subjective claim or knowledge or right, remains lawful and evidence so obtained is admissible. Here, the agent took control of the car, searched it and seized contraband. He intended to do what he did and his actions constituted a continuous course of conduct. The conduct was justified because the agent had probable cause to seize the vehicle and the legality of his actions are not affected by his subjective beliefs."

It is, thus, immaterial that federal and Amarillo officers decided to obtain an unnecessary state search warrant and it is also immaterial that the Secret Service agent may have believed that the car was not seized until after the thirty counterfeit notes were found under the floor mat. On probable cause, the Appellant was arrested by Amarillo police officers for passing a counterfeit $5.00 note in Amarillo and his car used in connection with said crime, as reported to the Amarillo police by his victim, was effectively seized by the Amarillo police officers under the seizure and forfeiture statutes above mentioned when they took the car into custody after stopping and arresting the Appellant while driving the same. Officers of the law cannot be held to know all of the niceties of the law and if it is determined that their actions have the sanction of the law, such actions are completely legal for all purposes and any evidence obtained thereby is admissible in court.

Appellant also urges error in the out-of-court identifications of himself by photographs presented to certain witnesses to whom he had passed $5.00 counterfeit notes. In some instances this was accomplished through the use of only one photograph (of Apepellant) and in one instance with several different photographs being presented (including one of Appellant). However, at the

trial all of the witnesses positively identified the Appellant in the courtroom and testified that their courtroom identification was independent of photographs earlier shown to them. In these circumstances, the in court identification of Appellant was entirely proper and Appellant did not suffer a denial of due process or prejudice. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. F.2d 1247, 88 S. Ct. 967 (1968). And see *United States v. Broadhead*, 413 F.2d 1351 (Seventh Cir. 1969), holding that if there is an independent basis for an in court identification of the accused, there is no error in permitting a witness to make such identification even though an improper line-up had been conducted (there was no line-up conducted in our case.)

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 210

CHARLES DAVIDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1970. A petition for rehearing was denied on April 20, 1970. The petition for a writ of certiorari was filed on June 1, 1970, and is out of time under Rule 22(3) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether counterfeit currency should have been suppressed as evidence when it was seized from an impounded automobile by state police officers pur-

400-118—70——1

suant to a search warrant obtained from a state justice of the peace by state police officials who were cooperating with federal officers.

2. Whether the court of appeals properly could uphold the legality of a search and seizure under a legal theory not considered by the district court.

STATEMENT

After a jury trial in the Northern District of Oklahoma, petitioner was convicted of passing a counterfeit $5.00 federal reserve note in Tulsa, Oklahoma in violation of 18 U.S.C. 472. On April 8, 1969, he was sentenced to imprisonment for five years. The court of appeals affirmed (Pet. App.).

On December 14, 1967, petitioner passed three counterfeit $5.00 Federal Reserve notes, the first at a cafe in Webb City, Missouri (Tr. 59–66), and the other two at gasoline stations in Tulsa, Oklahoma (Tr. 33–39) and Amarillo, Texas (Tr. 89–93).

Shortly after petitioner had left the Amarillo service station, the attendant, discovering the counterfeit bill, summoned the Amarillo police. He gave them a description of petitioner and identified the 1968 Cadillac which petitioner was driving. About an hour later, the police arrested petitioner as he drove away from an Amarillo restaurant (Tr. 95–97, 106–108). They drove his automobile to the police station and examined its contents for valuables, removing several items from the trunk for safekeeping. The automobile was then taken to a nearby garage where it was impounded (Tr. 109–110, 114–115).

The following morning, an Amarillo police officer telephoned the federal Secret Service office in Dallas,

Texas, and discussed the question of obtaining a search warrant to search the Cadillac. The state police then proceeded to obtain a state warrant from a justice of the peace to search the automobile for counterfeit money and implements designed and adapted for counterfeiting (Tr. 119, 122, 130, 147–148).[1] In the search that followed, the police found thirty counterfeit $5.00 notes under the front floor mat of the automobile (Tr. 127).

At trial, petitioner sought to suppress the counterfeit bills by arguing that the warrant was an invalid federal warrant under Rule 41(a) of the Federal Rules of Criminal Procedure since it had not been issued by a judge of a state court of record (Tr. 121–126, 177–183).[2] The trial judge rejected this contention and admitted the fruits of the search into evidence. He ruled that the "search was essentially a state search" and that, even if considered to be a federal search, the warrant coming from a justice of the peace court in Texas was still valid (Tr. 183–185). In affirming, the court of appeals noted that the validity of the search warrant under Rule 41(a) was not determinative here. It pointed out that because petitioner was using the Cadillac to transport contraband, the vehicle could properly have been searched without a search warrant pursuant to the Contraband Seizure Act, 49 U.S.C. 781–783 (Pet. App. A–4).

---

[1] The police officer said he would have obtained the search warrant even if he had not spoken to the federal agent (Tr. 134).

[2] Petitioner also contended that the warrant was based upon an insufficient affidavit. That argument is not made here.

ARGUMENT

1. Petitioner reargues here that the state search failed to meet Fourth Amendment standards (Pet. 12). As pointed out by the court of appeals, however, the Amarillo police had probable cause to believe that petitioner had violated federal law in passing a $5.00 counterfeit note at an Amarillo service station (Pet. App. A–4). They had been informed that he was driving a 1968 Cadillac. On this basis, they properly could have carried out an immediate search of the automobile at the police station, not only for valuables, but for counterfeit currency. See *Chambers* v. *Maroney*, No. 830, O.T., 1969, decided June 22, 1970. The fact that the officers delayed a thorough search of the Cadillac until after they had consulted a federal Secret Service agent and had obtained a state search warrant from a Texas justice of the peace did not violate the Fourth Amendment. This is so whether the search is considered to be state or federal.

As a state search, there was clearly sufficient basis for issuance of the warrant by a local justice of the peace on submission of an affidavit setting forth information that a counterfeit $5.00 note had been passed at a local gasoline station.[3]

Treated as a federal search, the actions of the officers were fully authorized under 49 U.S.C. 781–783.

[3] Under Texas law a search warrant may be issued to "search places where it is alleged implements are kept for use in forging or counterfeiting." Article 18.02, Texas Code of Criminal Procedure. While Texas counterfeit statutes are limited to false coins, it is also an offense under Texas law to obtain property by false pretenses. See Articles 1012, 1545, Texas Penal Code.

Petitioner concedes (Pet. 12) that "had a federal officer * * * seized and searched his automobile" pursuant to this statute, "the evidence found would be admissible." However, he argues for a different result because the search and seizure were conducted by state officers who admittedly (Pet. 6, 10) were cooperating with federal officers. As the court below correctly held, the statute makes no such fine distinction (Pet. App. A3–A4). Instead, it makes it the duty of any officer *authorized by law* to seize vehicles known to be used to transport contraband. Counterfeit federal reserve notes are contraband. 49 U.S.C. 781(b)(3).

Petitioner advances the additional argument that in any event his automobile had never been properly "seized" by the Amarillo police. This contention is equally unfounded. We point out that the state officers in this case were in effect acting on behalf of the Dallas federal agents at the time they searched the automobile for counterfeit currency. The court of appeals was entirely correct in concluding that the impounding of the Cadillac by the Amarillo police was in these circumstances a proper seizure within the meaning of the federal forfeiture statute (Pet. App. A5–A6). Accordingly, a search even without a warrant would not have infringed petitioner's Fourth Amendment rights. *Cooper* v. *California*, 386 U.S. 58; see *United States* v. *Francolino*, 367 F. 2d 1013, 1018–1023 (C.A. 2), certiorari denied, 386 U.S. 960; *United States* v. *Troiano*, 365 F.2d 416, 418–419 (C.A. 3); *Drummond* v. *United States*, 350 F.2d 983, 988 (C.A.

8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944.[4]

There is, therefore, no occasion on this petition to reach the question whether a warrant obtained by a state officer, even if acting for a federal purpose, is invalid when it conforms to local law and the requirements of the Fourth Amendment, but not to the procedure laid down in Rule 41(a). See *Navarro* v. *United States*, 400 F.2d 315 (C.A. 5). See also *United States* v. *Ravich*, 421 F.2d 1196, 1201, note 5 (C.A. 2), pending on petition for certiorari, No. 5144.

2. Petitioner also asserts that because the court of appeals affirmed the decision of the trial court on the basis of a "legal theory" (Pet. 9) not relied on below, he was deprived of "the opportunity to develop factual evidence as to the authority of the local police to make the search." However, the issue of whether local police are, under the circumstances of this case, authorized to make a search of an automobile known to be used to transport contraband presents a legal rather than a factual question. As the court concluded in *Egan* v. *Teets*, 251 F.2d 571, 576 (C.A. 9):

> It is a rule of appellate adjudication that, if the order or judgment under review is not sustainable on the ground relied upon by the trial

[4] In *Rent* v. *United States*, 209 F. 2d 893, 896 (C.A. 5), as petitioner states, the court did note that the federal officer did not purport to "seize" the automobile under the forfeiture statutes. However, there the search in essence was held to be unjustified because it was not incident to an arrest. The issue did not turn on whether there had been a proper seizure under the forfeiture statutes. See also *Vaccaro* v. *United States*, 296 F.2d 500 (C.A. 5); *Brett* v. *United States*, 412 F.2d 401, 405–406 (C.A. 5).

judge, but is sustainable on another ground which could be and was fairly presented on appeal, there should be an affirmance.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JULY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970